(3) (4)

Nos. 03-1111 and 03-1108

Supreme Court, U.S.
FILED
MAR 3 0 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHRIS NELSON,
SOUTH DAKOTA SECRETARY OF STATE, *et al.*,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

-and-

DAKOTA RURAL ACTION,
SOUTH DAKOTA RESOURCES COALITION,
Petitioners,

v.

SOUTH DAKOTA FARM BUREAU, INC., *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD O. GREGERSON
WOODS, FULLER, SHULTZ & SMITH
P.O. Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890

DAVID S. DAY
Counsel of Record
315 Forest Avenue
Vermillion, SD 57069
(605) 624-3495

Attorneys for Respondents South Dakota Farm Bureau, Inc.; Frank Brost; South Dakota Sheep Growers Association, Inc.; Haverhals Feedlot, Inc.; Sjovall Feedyard, Inc.; Donald Tesch; and William A. Aeschlimann

(Additional Counsel Listed on Inside Cover)

BEST AVAILABLE COPY

DAVID A. GERDES
NEIL K. FULTON
MAY, ADAM, GERDES
AND THOMPSON
P.O. Box 160
Pierre, SD 57501
(605) 224-8803

Attorneys for Respondents Montana Dakota Utilities Co.; North-Western Public Service; and Otter Tail Power Company

THOMAS A. TONNER
TONNER, TOBIN & KING LLP
P.O. Box 1456
Aberdeen, SD 57402-1456
(605) 225-1000

Attorneys for Respondents Marston Holben; Spear H. Ranch Inc.; and Marston and Marion Holben Family Trust

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Should this Court grant certiorari to petitioners to review the unanimous Court of Appeals decision that South Dakota's ban on so-called "corporate farming" impermissibly discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine?

CORPORATE DISCLOSURE STATEMENT

Montana-Dakota Utilities Co. is a division of MDU Resources, Inc. Northwestern Public Service is a division of Northwestern Corporation. On 9 April 2002, Otter Tail Power Company changed its corporate name to Otter Tail Corporation. No publicly traded company owns 10% or more of the stock of any of these entities. The other corporate entities for Respondents are privately held corporations.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	vi
Statement of Case	1
A. South Dakota's Regulation Of Interstate Commerce: "Amendment E".	1
B. Factual Background.	2
1. General History of Amendment E.	2
2. The Legislative History of Amendment E.	3
3. The Adverse Impact of Amendment E on Interstate Commerce.	6
C. Procedural History	8

Contents

	Page
Reasons for Denying the Petition	10
Arguments	10
I. This Case Does Not Present An Issue To Which The Lower Courts Are In Conflict.	10
A. This Eighth Circuit's Ruling Does Not Conflict With Any Of This Court's Decisions.	10
1. The *Exxon Corp.* Decision.	11
2. The Eighth Circuit's Ruling Is Distinguishable From *Exxon Corp.*	12
B. Petitioners' "Discriminatory Purpose" Argument Is Flawed.	13
C. Petitioners' Argument That Some Evidence of Discriminatory Purpose Was Improper Should Be Rejected.	14
D. Conclusion.	16
II. The Petitions Do Not Present An Issue Of National Constitutional Importance.	16
A. No Other State Law Is Actually "Similar" To The South Dakota Law.	16

Contents

Page

1. Petitioners Exaggerate The Scope Of These Laws. 16

2. The Eighth Circuit's Ruling Lacks National Importance Because of Its Narrow, Fact-Specific Grounds. . . 18

3. Conclusion. 19

C. Petitioners "Immunity For Initiated Measures" Argument Is Flawed. 19

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Case Authorities:

Allegheny Corp. v. Richardson, Inc., 463 N.W.2d 678 (S.D. 1990) 2

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 15

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 13

Baldwin v. Seelig, 294 U.S. 511 (1936) 13

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 15

Cooper v. Aaron, 358 U.S. 1 (1958) 20

Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) 15

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10-11, 12

Hoogestraat v. Barnett, 583 N.W. 2d 421 (S.D. 1998) 5

Hunt v. Wash. Apple Advertising Comm'n, 432 U.S. 333 (1977) 13

Cited Authorities

Page

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 15

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 12

Reitman v. Mulkey, 387 U.S. 369 (1967) 17, 20

Romer v. Evans, 517 U.S. 620 (1996) 17, 20

Constitutional References:

Neb. Const. Art. XII, § 8 16

S.D. Const. Art. XVII, §§ 21-24 1

Statutory References:

Iowa Code Ann. § 9H.1 *et seq.* (2001) 16, 17

Kan. Stat. Ann. § 17-5904 (Supp. 2002) 16

Minn. Stat. Ann. § 500.24 (West 2002) 16

Mo. Rev. Stat. 350.02 (Vernon 2001) 16

N.D. Cent. Code §§ 10-05.1-01 *et seq.* (2001) 16

Okla. Stat. Ann. Tit. 18 § 951 (Supp. 2004) 16

Cited Authorities

Page

SDCL § 47-9A-1 *et seq.* (2003) 2

SDCL § 47-9A-13 2

SDCL § 47-9A-13.1 2

SDCL § 47-9A-14 2

Wis. Stat. Ann. § 182.001(1)(a) (2002) 16

Miscellaneous References:

Erwin Chemerinsky, *Constitutional Law* (2d ed. 2002) 13

John E. Nowak and Ronald D. Rotunda, *Constitutional Law* (6th ed. 2000) 13

Op. of Neb. A.G., No. 229 (1984) 18

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 12

Petitioners request that this Court grant certiorari to review an unremarkable decision of the Court of Appeals for the Eighth Circuit. *See* State Petitioners' Appendix at 1-27 (hereinafter referenced as "St. App. at __"). That unanimous panel decision held that a South Dakota law that prohibited certain common business practices in the livestock production industry and the electric utility power industries discriminated against interstate commerce in violation of this Court's dormant Commerce Clause doctrine. The petitions should be denied because the questions involved in this case are controlled by the previous decisions of this Court. Moreover, there is no conflict among the lower courts regarding the routine and doctrinally ordinary issues presented herein.

STATEMENT OF CASE

A. South Dakota's Regulation Of Interstate Commerce: "Amendment E".

The state regulatory scheme at issue in this case is a provision of the South Dakota State Constitution, Art. XVII, §§ 21-24. *See* St. App. at 90-94. It was adopted in 1998. Because of its placement on the ballot in 1998, it has been called "Amendment E". (Respondents will use hereinafter this terminology.) Amendment E is a detailed, intricate and comprehensive regulatory scheme that restricts the use of "corporate" or limited liability business structures by business entities involved in farming or ranching. St. App. at 90-94.

B. Factual Background.

1. General History of Amendment E.

As a matter of history, South Dakota's regulation of the involvement of corporations in agriculture began, for present purposes, with the Legislative passage of the Family Farm Act of 1974 (the "Act"). SDCL §§ 47-9A-1, *et seq*. Under the Act, corporate ownership or leasing of "agricultural land" was generally restricted.[1] The Act did not apply, however, to the livestock production industry.

The Act provided, for domestic corporations, two basic exemptions from the general prohibition of corporate format. The first was the "family farm corporation", SDCL § 47-9A-14. The second exemption was the provision for an "authorized farm corporation". *See id.* at 15. For present purposes, the authorized farm corporation might be understood as an exemption for certain small, closely-held corporations, defined largely in terms of federal income tax law.

The Act was tightened in 1988. It was amended to prohibit all corporations except family farm corporations from owning or operating a "hog confinement facility". *See* SDCL § 47-9A-13.1. Subsequent to 1988, it appeared that corporations could own the hogs that were raised or finished by South Dakota farmers. It was in response to this "contract farming" practice that the proponents of

1. The Act explicitly prohibited foreign corporations from any ownership of land. *See* SDCL §§ 47-9A-13 and 14; *Allegheny Corp. v. Richardson, Inc.*, 463 N.W.2d 678, 679 (S. D. 1990). This indicates that State law historically favored domestic corporations and discriminated against out-of-state corporations.

Amendment E (led by Petitioners Dakota Rural Action and South Dakota Resources Coalition) started the Initiative process that culminated in Amendment E.

Although South Dakota appeared to have established a comprehensive regulatory scheme under the Act, the State hardened its position by adopting Amendment E. St. App. at 5. Amendment E is qualitatively more restrictive and more burdensome regarding interstate commerce in the livestock production and electric power industries.

The constitutionally significant differences between the Act and Amendment E are: (1) although the Act only applied to land ownership, Amendment E applied to the ownership of livestock; (2) although both the Act and Amendment E had exceptions for so-called "family farm" operations, the family farm exception under Section 22(1) of Amendment E was much narrower; (3) the Act had a second exception (for "authorized farm corporations") but Amendment E does not have this type of exception; (4) Amendment E was enacted as an amendment to the South Dakota Constitution thereby restricting any opportunities for its opponents, including Respondents, to use the normal legislative processes to correct any mistakes created by Amendment E; and (5) Amendment E's enforcement procedures (*e.g.*, "citizen standing") were much broader and potentially intrusive than the enforcement provisions of the Act, which relied on the Attorney General's office and the Secretary of State's office.

2. The Legislative History of Amendment E.

Both the sequence of events leading to the development of Amendment E and its legislative history are significant to understanding the soundness of the Eighth Circuit's

unanimous decision. *See* St. App. at 18-24. Although the Act prohibited most corporate involvement in agriculture, certain groups (including petitioners Dakota Rural Action ("DRA") and South Dakota Resources Coalition ("SDRC")) sought to impose even more restrictive regulations. Starting in March 1997, these sponsors held a set of meetings called "Hog Meetings". St. App. at 20. These meetings featured politicians and other activists generally strategizing against hog farming facilities (hence—the name "Hog Meetings"). Because of South Dakota's initiative laws, the sponsors had to act quickly in order to qualify any proposed amendment for the November 1998 ballot. In fact, the sponsors completed all deliberation and all drafting in less than eight weeks. As the lower courts recognized, this time pressure lead to haste in drafting, other procedural irregularities, *see* St. App. at 36, and nullified any chance that the proponents actually studied the potential effects of Amendment E. *See* St. App. at 22-23.

During this hasty drafting process, the sponsors were "warned" several times about the dormant Commerce Clause issues created by such a broad regulatory measure as Amendment E. For example, at the very first drafting meeting, the only lawyer on the five-person committee warned that the proposed amendment faced "Commerce Clause" problems; the lawyer was ignored. Trial Ex. 36. Shortly after this initial warning, the drafting committee was warned again—this time by a distinguished agricultural economist who the Eighth Circuit called an "expert"—that Amendment E would be vulnerable because it established such "complete" barriers to capital flow. St. App. at 21. Despite these warnings, the drafters, according to the Eighth Circuit, "charged forward without hesitation". *Id* at 22.

During the Initiative election campaign, several additional events occurred that demonstrated the protectionist purpose of the sponsors of Amendment E. First, the Initiative process provided the sponsors with a chance to promote Amendment E. The sponsors of Amendment E prepared a document called the "Pró Statement" which is disseminated to the voters. As the Eighth Circuit concluded, the Pro Statement was "brimming with protectionist rhetoric". *See* St. App. at 18-19. One example of the protectionist rhetoric was the statement that, unless Amendment E would pass, "[d]esperately needed profits will be skimmed out of the local economies and into the pockets of distant corporations". *Id.* at 19. Moreover, the sponsors further claimed in the Pro Statement that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations". *Id.* In sum, the sponsors "sold" Amendment to the voters based on economic favoritism for "local economies" and hostility to "distant corporations". *See id.*

Second, in the Official Ballot Statement, South Dakota's Attorney General Mark Barnett (who was originally a defendant here) stated to all voters: "Amendment E could result in successful lawsuits against the State of South Dakota, under the U.S. Constitution". *See Hoogestraat v. Barnett*, 583 N.W.2d 421, 422 (S.D. 1998). On state law grounds, the South Dakota Supreme Court removed the sentence but not before it had state-wide publicity.

In addition to these "official" documents, the Eighth Circuit carefully reviewed other evidence of discriminatory purpose produced by Respondents at trial, mainly from cross-examination of Petitioners' witnesses. *See id.* at 20-22.

One of the most glaring pieces of testimony was the admission by the State's expert witness that Amendment E was a "South Dakota Law designed to restrict operation of global agribusiness firms". Trial Tr. at 505. The Eighth Circuit focused, moreover, on the testimony of one of the drafters of the Pro Statement that the purpose of Amendment E was to avoid "the Murphy hog farm unit [in North Carolina] and what its [sic] done to the environment". *See* St. App. at 20.

Other trial testimony, from drafters and other sponsors, established the transparency of the protectionism underlying Amendment E.[2] As the Eighth Circuit concluded: "It is clear that those individuals had a discriminatory purpose". *Id.* at 23.

3. The Adverse Impact of Amendment E on Interstate Commerce.

The adoption of Amendment E has created many economic problems for Respondents and other farmers and ranchers. At trial, the Respondents demonstrated the constitutionally pernicious consequences of Amendment E. Amendment E, for example, has severely limited the "value-added" process of "custom feeding livestock". Under Amendment E, feedlots cannot finish investor-owned livestock if the investor has a corporate format; Amendment E, therefore, interferes with

---

2. Even the District Court had concluded that "There was some evidence at trial that Amendment E was motivated by discriminatory purposes." St. App. at 80. Indeed, when one reads the whole transcript, it is Respondents' contention that the testimony of the sponsors (including the drafters and their lawyer) presents a collective impression that the sponsors were proud of their economic protectionism and even defiant regarding the "warnings" (based on federal constitutional law) which they had received.

the interstate flow of investment capital. Amendment E has restricted all forms of "contract livestock production". From the testimony of State officials, the District Court learned that investment in farming and ranching, especially by non-residents, has been suppressed and distorted, with the burden on interstate commerce running into the millions of dollars.

The Utility Respondents, obviously participants in interstate commerce, demonstrated at trial how Amendment E had adversely impacted interstate commerce in several ways. First, the Utility Respondents are each interstate transmission utilities. Transmission corridors utilized by these transmission companies are typically owned by utilities in the form of transmission easements. The proscriptions of Amendment E apply to ". . . an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state. . . ." St. App. at 90. The District Court made a finding of fact that Amendment E cuts off the Utility Respondents from their traditional easements and increases their costs. *Id.* at 86.

Another significant burden on interstate commerce created by Amendment E relates to the wind power aspect of the Utility Respondents' business. *Id.* at 87. Amendment E blocks the development of transmission corridors for electric power generated by wind farms. South Dakota is a "prime location" for potential output of electrical energy generated by wind power; if South Dakota does not carry its share of wind power, it will place a greater burden on interstate commerce to develop wind power in other states. *Id.* at 86.

In sum, the effects of Amendment E on interstate commerce have been substantial and far-reaching. As the District Court recognized in its findings of fact, Amendment E has placed enormous added costs on Respondents, and others,

doing business in interstate commerce. St. App. at 86. Amendment E has suppressed interstate investment in the livestock industry, especially production contract farming and custom-finishing of livestock. Amendment E has prohibited the flow of interstate investment, particularly in the livestock industry and in the electric power production industry. In an interlocking multitude of ways, Amendment E has suppressed and impermissibly distorted interstate commerce.

C. Procedural History

Shortly after Amendment E was adopted, the Respondents began their investigation of the effects of Amendment E on the livestock and electric power industries and their planning of an appropriate legal action. The Respondents filed their claims in federal district court for the District of South Dakota. The Respondents from the livestock industry were joined by the Utility Respondents from the electric power generation and transmission industries.

Following discovery, the District Court denied various motions for summary judgment brought both by the State Petitioners and by the Intervenor Petitioners. The District Court (the Honorable Charles Kornmann) held a five-day bench trial in December, 2001. Respondents pursued their dormant Commerce Clause theories. The Respondents argued, and presented evidence, that Amendment E was a "discriminatory" state regulatory scheme. Respondents argued that Amendment E was discriminatory, under three theories: discriminatory purpose, facial discrimination and discriminatory effect. Respondents also argued, alternatively, that Amendment E "unduly burdened" interstate commerce.

The District Court eventually ruled for the Respondents on several grounds, including the dormant Commerce Clause claim. St. App. at 87. The District Court relied on the second tier of the dormant Commerce Clause doctrine, holding that Amendment E imposed an undue burden on interstate commerce. *See* St. App. at 85-86.

Both Petitioners appealed to the court of appeals for the Eighth Circuit. On appeal, the Respondents contended, as below, that Amendment E was both a discriminatory state regulatory scheme and, alternatively, one that unduly burdened interstate commerce. *See* St. App. at 26-27. Respondents contended that Amendment E was discriminatory under all three theories. St. App. at 18. Following briefing and oral argument, the Eighth Circuit panel unanimously affirmed the District Court but on different grounds. The Eighth Circuit held that the Amendment E regulatory scheme was discriminatory and that the state Petitioners did not satisfy their burden of persuasion. St. App. at 26-27. The Eighth Circuit carefully indicated that, because it found overwhelming evidence of a discriminatory purpose underlying Amendment E, "we do not consider the other two tests [for discrimination], or the second tier analysis, the *Pike* balancing test." St. App. at 18. The Eighth Circuit concluded that it had found the evidence of discriminatory purpose in the record sufficient to place the case in the discrimination tier of the dormant Commerce Clause doctrine.

The Intervenor Petitioners sought rehearing and rehearing *en banc*. The State Petitioners did not join, but also did not disclaim, the rehearing petition. The rehearing petition was eventually denied. St. App. at 3. Subsequently, both Petitioners timely filed separate petitions for a writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

This is an unremarkable case. The decision by the Court of Appeals was a straight-forward, almost routine application of this Court's dormant Commerce Clause jurisprudence. The Eighth Circuit's decision does not conflict in any way with this Court's decisions or any other circuit's decisions concerning the dormant commerce Clause doctrine. Moreover, since the South Dakota law at issue is unusual (and certainly the most extreme of any such laws), this case does not represent a constitutional issue of significant public importance.

As discussed below, this case is merely an old-fashioned dormant Commerce Clause case. The Eighth Circuit's ruling was proper in all respects, and Respondents respectfully urge this Honorable Court to deny the Petitions for Writ of Certiorari.

ARGUMENTS

I. This Case Does Not Present An Issue To Which The Lower Courts Are In Conflict.

In an attempt to secure this Court's attention, Petitioners claim that the Eighth Circuit's decision conflicts with this Court's decisions or with certain lower court decisions. Upon examination, however, these claims are simply not sustainable.

A. This Eighth Circuit's Ruling Does Not Conflict With Any Of This Court's Decisions.

The Petitioners place primary reliance on an alleged conflict with this Court's decision in *Exxon Corporation v.*

Governor of Maryland, 437 U.S. 117 (1978). *See* State Pet. at 12; Intervenor Pet. at 11. When the holding in *Exxon Corp.* is properly described, however, it is apparent that the Eighth Circuit decision does not in any way conflict with *Exxon Corp.* decision.

1. The *Exxon Corp.* Decision.

In *Exxon Corp.*, the state of Maryland enacted a statute requiring producers and refiners of petroleum products to divest any retail gasoline stations in Maryland. 437 U.S. at 125. The divestiture statute was challenged under several constitutional theories, including dormant Commerce Clause doctrine. *See id.* at 122. At the time the statute was passed, there were no producers or refiners in Maryland, and the burden of divestiture fell, therefore, solely on out-of-state companies. This Court concluded only a "small" percentage of the retail gasoline stations would be impacted. *Id.* at 123.

Petitioners' argument is flawed because they rely only on certain dictum in *Exxon Corp.* Such reliance is inadequate to support the petitions. The *Exxon Corp.* decision rested on the unique facts that there were no local producers or refiners and, hence, no local entities could have been "favored". *See id.* at 125 Moreover, the *Exxon Corp.* Court concluded that the record in this case showed "no demonstrable effect whatsoever on the interstate flow of goods". *Id.* at 126 n.16. Because there was no burden on interstate commerce and no evidence of protectionism, this Court in *Exxon Corp.* decided that the Maryland statute was not discriminatory. *Id.* at 125.

The Petitioners also argue that the *Exxon Corp.* "principle" has been "reaffirmed". Actually, any principle derived from *Exxon Corp.* has been narrowed over time,

particularly in this Court's decision in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 40-41 (1980). In *Lewis*, just two years after *Exxon Corp.*, this Court confirmed that the *Exxon Corp.* decision depended on the absence of any showing that interstate commerce was burdened. *Lewis*, 447 U.S. at 42. *See* Laurence H. Tribe, *American Constitutional Law* 1059 n.1 (3d ed. 2000) (*Exxon Corp.* decision depended upon "no evidence" of discrimination).

2. The Eighth Circuit's Ruling Is Distinguishable From *Exxon Corp.*

When the *Exxon Corp.* decision is properly understood, this case is easily distinguishable. First, the Respondents in this case made a strong showing that Amendment E had a discriminatory effect on interstate commerce. The Eighth Circuit indicated that it did not have to reach to this evidence because other evidence in the record (regarding purposeful discrimination) was so overwhelming. St. App. at 18. Thus, contrary to *Exxon Corp.* where there was "no evidence" of impermissible effect, this record demonstrated discriminatory effects—both exclusionary (tariff) and favoritism (protectionism).

Second, this case is also distinguishable because the Respondents demonstrated that Amendment E was facially discriminatory. In *Exxon Corp.*, this Court concluded that the Maryland statute was not facially discriminatory. *See Lewis*, 447 U.S. at 41-43. Thus, because the Eighth Circuit could have rested on a facial discrimination approach, the Eighth Circuit's decision is distinguishable from *Exxon Corp.*

In sum, since *Exxon Corp.* is distinguishable, there is no conflict with this decision and no basis for the Petitions.

B. Petitioners' "Discriminatory Purpose" Argument Is Flawed.

Petitioners also argue that a discriminatory purpose alone is insufficient for a court to find that a state regulatory scheme is "discriminatory". Petitioners then assert, as a minor premise of their argument, that the Eighth Circuit's decision was based "solely" on a determination of discriminatory purpose. *See* St. App. at 11. Therefore, Petitioners argue that the petition should be granted because the Eighth Circuit's decision is inconsistent with this Court's doctrine.

First, the major premise of Petitioners' argument is not supported or supportable. It is hornbook law that *discrimination* can be demonstrated any one of three ways: (1) facial discrimination; (2) discriminatory purpose; or (3) discriminatory effect. *See, e.g., Hunt v. Wash. Apple Advertising Comm'n*, 432 U.S. 333, 352 (1977); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); Erwin Chemerinsky, *Constitutional Law* 417 (2d ed. 2002); John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 661-662 (6th ed. 2000). Petitioners' mistaken argument that discrimination cannot be shown by discriminatory purpose alone is directly refuted by the *Bacchus Imports* decision. There, this Court stated:

> Examination of the State's purpose in this case is sufficient to demonstrate the State's lack of entitlement to a more flexible approach [*i.e.*, the undue burden standard] . . .

Id., 468 U.S. at 270. *See also Hunt*, 432 U.S. at 352 (implying that purpose alone would be sufficient); *Baldwin v. Seelig*, 294 U.S. 511, 527 (1936) (the regulations were "hostile in

conception"). The major premise of Petitioners' argument, therefore, is fatally flawed.

That is not, moreover, the only weakness in Petitioners' argument. The minor premise cannot be sustained. In this case, the Eighth Circuit did not reject Respondents' theories of facial discrimination and discrimination in effect. The Eighth Circuit simply concluded that, since the evidence of discriminatory purpose was so overwhelming, it did not have to *reach* any other theory of discrimination or undue burden:

> . . . but we rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the *Pike* balancing test.

St. App. at 28. Thus, the minor premise of Petitioners' argument is also flawed. This argument does not present any basis for further review.

C. Petitioners' Argument That Some Evidence of Discriminatory Purpose Was Improper Should Be Rejected.

One of Petitioners' arguments appears to be that it was improper for the Eighth Circuit to consider sworn testimony from the drafters of Amendment E or other sponsors of the Amendment E initiative process in determining that an impermissible discriminatory purpose was underlying the enactment of the regulatory scheme. This argument flies in the face of this Court's well-settled doctrine.

Respondents' submitted at trial the testimony of the relevant decisionmakers (including the members of the drafting committee) and other Initiative sponsors under the authority of this Court's decisions in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) and *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 677 (1981) (consideration of a state Governor's "veto message" as part of the determination of discriminatory purpose). Since it was properly admitted at the trial, there was nothing improper about the Eighth Circuit's reliance on such evidence. As this Court stated just last Term: "Again, statements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative". *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196 (2003).

Amendment E was "ultimately enacted" to the detriment of interstate commerce. Some of the evidence of discriminatory purpose came from statements by the "sponsors" of Amendment E. Under this Court's ruling in *Cuyahoga Falls*, there was nothing improper about this evidence.[3] This Court should reject this argument and deny the Petitions.

---

3. Respondents would note that even Petitioners do not claim that the testimony of the sponsors was the only evidence on the issue of discriminatory purpose. Respondents submitted evidence on all six factors in *Arlington Heights*. *See* 429 U.S. at 268. In particular, Respondents relied on the sequence of events, legislative history and unrebutted evidence of discriminatory effect in addition to the evidence provided by the testimony of the sponsors. This is simply not a case of discriminatory purpose proven *only* by decisionmaker testimony.

D. Conclusion.

Under the circumstances, none of Petitioners' arguments asserting "inconsistency" are sustainable. No further review by this Court would be necessary. This Court should deny the Petitions.

II. The Petitions Do Not Present An Issue Of National Constitutional Importance.

The Petitioners also argue that this case presents "important" national questions. *See, e.g.*, St. Pet. at 21. However, when the extreme nature of South Dakota's peculiar law is recognized and the narrowness of the Eighth Circuit's decision is understood, the Petitions present unremarkable questions not worthy of further review.

A. No Other State Law Is Actually "Similar" To The South Dakota Law.

Both Petitioners claim that eight other states have "similar" laws to South Dakota's Amendment E.[4] This claim is, in fact, an exaggeration and, for the following reasons, should not be credited.

1. Petitioners Exaggerate The Scope Of These Laws.

Although eight States besides South Dakota have so-called anti-corporate laws, some of these State laws do not

---

4. In alphabetical order, the eight other state laws are: Iowa Code §§ 9H.1 to 9H.15; Kan. Stat. Ann. §§ 17-5902 to 17.5904; Minn. Stat. § 500.24; Mo. Rev. Stat. § 350.015; Neb. Const. Art. XII, § 8; N.D. Cent. Code §§ 10-06.1-01 to 10.06.1-27; Okla. Stat. Ann. Tit. 18 § 951; and Wis. Stat § 182.001.

generally cover the livestock industry.[5] Two states only regulate regarding the ownership of land: Kansas and Oklahoma. There are, in fact, only six State laws which purport to regulate the livestock industry as part of regulating farming or ranching.

Petitioners also exaggerate the alleged importance of this case when they omit to inform this Court that, even of the six States which generally regulate the involvement of corporations in the livestock industry, only two States (South Dakota and Nebraska) regulate through the draconian means of a State Constitutional provision. Placement of such a broad regulatory scheme in the State Constitution undercuts the normal legislative and political processes. In these two States, the normal processes—which lead to deliberation, study and compromise—have been cut off. *Cf. Romer v. Evans*, 517 U.S. 620, 631 (1996) (burdened parties can obtain protection "only by enlisting the citizenry of Colorado to amend the State Constitution . . ."); *Reitman v. Mulkey*, 387 U.S. 369, 377 (1967) (placement of state scheme in state constitution meant that it was now "embedded in the State's basic charter, immune from legislative or judicial regulation at any level of the state government."). This is an unusual burden placed on Respondents and, of course, interstate commerce. Under these circumstances, South Dakota's law is not actually "similar" in regulatory scope to the laws of any of the other States except, arguably, Nebraska.

Even regarding Nebraska, however, the Petitioners' "similarity" argument is an exaggeration. There is an important distinction between the South Dakota and

5. The state of Iowa does not generally regulate the corporate ownership of livestock; Iowa bans "any processor of beef or pork" from owning certain livestock. *See* Iowa Code § 9 H.2.

Nebraska laws as they affect the livestock industry. The Nebraska law only regulates the "front end" of the livestock industry. In Nebraska, feedlots and custom feeding operations (such as in the businesses of several Respondents) are not covered. *See, e.g.*, Opinion No. 229, 1984 Opinions of Neb. A.G., 1 (1984), 1984 W.L. 162900. In this case, South Dakota's law regulates the livestock industry from semen to slaughter—and is the broadest such scheme in the Nation. *See* St. App. at 93.

In sum, South Dakota's Amendment E regulates the livestock industry—not just land ownership. It regulates through a state constitutional mechanism—not the normal legislative process. South Dakota's Amendment E was intended as, and is, the broadest anti-corporate farming law in the Nation.

This case is not nationally important because South Dakota's law is uniquely broad and burdensome. The fate of Amendment E, therefore, has little implication, if any, for potential challenges to other state laws.

2. The Eighth Circuit's Ruling Lacks National Importance Because of Its Narrow, Fact-Specific Grounds.

This case is also not nationally important because of the way in which the Eighth Circuit analyzed the case. Although the Eighth Circuit could have struck down Amendment E on several grounds (*e.g.*, facial discrimination, discrimination in effect or as an undue burden on interstate commerce), the Court of Appeals used the narrowest possible grounds to find discrimination. Instead of plowing new doctrinal ground, the Eighth Circuit used a fact-specific, "discriminatory purpose"

analysis. The Eighth Circuit carefully scrutinized the Record to find the panoply of facts demonstrating the discriminatory purposes underlying the adoption of Amendment E. St. App. at 18-24.

The Eighth Circuit could have relied on facial discrimination or discriminatory effect. Instead it used a narrow (*i.e.*, more fact-specific) basis: the showing of discriminatory purpose. It is unlikely that any other state regulatory scheme would have a similarly overwhelming record of discriminatory purpose. The narrow grounds for the Eighth Circuit's decision, therefore, belie any of Petitioners' claims of national importance.[6]

3. Conclusion.

In sum, this case involves the broadest such state law struck down by the Eighth Circuit on the narrowest available grounds. Under these circumstances, the Eighth Circuit's analysis (while entirely proper) would be limited in its applicability to any other state law. Consequently, the Petitioner's claim of "national significance" should be recognized as an argumentative exaggeration, and this Court should deny these Petitions.

C. Petitioners "Immunity For Initiated Measures" Argument Is Flawed.

As one of their arguments, the State Petitioners claim that the Eighth Circuit's decision somehow violates the state's rights simply because the state's regulatory scheme was placed in its state constitution. This argument for national

6. The way the Eighth Circuit decided this case was a strength—not a weakness. Using the narrowest ground (when available) is a sound and common approach, consistent with an Article III court's role.

significance is fatally flawed. There is no constitutional immunity for state laws just because they are placed in the state's constitution through the initiative process. *See Reitman v. Mulkey*, *supra*, 387 U.S. at 381. In another recent example, this Court struck down a Colorado state constitutional amendment in *Romer v. Evans*, *supra*, 512 U.S. at 631. Moreover, although the State of Arkansas placed its disagreement with this Court's decisions in its constitution, the state's defiance was not immunized against the principles of the federal constitution. *See Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Similarly here, just because the South Dakota's disagreement with the principles of this Court's dormant Commerce Clause doctrine was placed in its state constitution by the Initiative process does not immunize the petitioners' position. Under these circumstances, no further review by this Court is necessary, and this Court should deny the Petitions.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petitions.

Respectfully submitted,

DAVID S. DAY
Counsel of Record
315 Forest Avenue
Vermillion, SD 57069
(605) 624-3495

RICHARD O. GREGERSON
WOODS, FULLER, SHULTZ & SMITH
P.O. Box 5027
Sioux Falls, SD 57117
(605) 336-3890

Attorneys for Respondents
South Dakota Farm Bureau, Inc.;
Frank Brost; South Dakota Sheep
Growers Association, Inc.;
Haverhals Feedlot, Inc.;
Sjovall Feedyard, Inc.;
Donald Tesch; and
William A. Aeschlimann

DAVID A. GERDES
NEIL K. FULTON
MAY, ADAM, GERDES
AND THOMPSON
P.O. Box 160
Pierre, SD 57501
(605) 224-8803

Attorneys for Respondents
Montana Dakota Utilties Co.;
North-Western Public Service; and
Otter Tail Power Company

THOMAS A. TONNER
TONNER, TOBIN & KING LLP
P.O. Box 1456
Aberdeen, SD 57402
(605) 225-1000

Attorneys for Respondents
Marston Holben;
Spear H. Ranch Inc.;
and Marston and Marion Holben
Family Trust